No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PUERTO RICO PORT AUTHORITY,

Petitioner,

—v.—

BROTHERHOOD OF OFFICE AND COMMERCIAL WORKERS AND CATAÑO TRANSPORTATION WORKERS UNION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PUERTO RICO, SAN JUAN DIVISION

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Prior to July 6, 1989, the Puerto Rico Port Authority was party to collective bargaining agreements with Respondent unions under which the Port Authority was obligated to allow employees, without limitation, to accrue or "bank" vacation days in excess of the minimum required by law for later use or for liquidation in cash upon their separation from employment. Effective July 6, 1989, the Puerto Rico Minimum Wage Board amended its transportation industry regulation to add a penalty provision requiring that employers pay their employees two days' pay for every vacation day accrued in excess of the number of days that can be accrued in two years. The court below held that the new penalty provision applies to leave that employees elected to bank, in accordance with the terms of the collective bargaining agreements, before the amendment of the regulation. The questions presented are:

1. Whether the retroactive application of the new penalty provision constitutes an impermissible impairment of the collective bargaining agreements prohibited by the Contract Clause of the U.S. Constitution (art. I, § 10, cl. 1).

2. Whether the imposition of the new penalty punishes the Port Authority for preenactment conduct in violation of the Ex Post Facto Clause of the U.S. Constitution (art. I, § 10, cl. 1).

RULE 29.1 LISTING

The Puerto Rico Port Authority does not have any parent companies or any subsidiaries other than wholly owned subsidiaries.

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BROTHERHOOD OF OFFICE AND COMMERCIAL WORKERS AND CATAÑO TRANSPORTATION WORKERS UNION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PUERTO RICO, SAN JUAN DIVISION

Petitioner, Puerto Rico Port Authority (the "Port Authority"), respectfully prays that a writ of certiorari issue to review the judgment of the Superior Court of Puerto Rico, San Juan Division, entered on June 8, 1993.

OPINIONS BELOW

The judgment of the Superior Court of Puerto Rico, which is not reported, is reprinted as Appendix A hereto. It affirms an arbitration award issued through the Conciliation and Arbitration Bureau of the Commonwealth of Puerto Rico Department of Labor

and Human Resources, also not reported, which is reprinted as Appendix B hereto.

The decision of the Supreme Court of Puerto Rico denying discretionary review of the judgment of the Superior Court is reprinted as Appendix C hereto. The decisions of the Supreme Court of Puerto Rico denying the Port Authority's Motion for Reconsideration and its Second Motion for Reconsideration are reprinted as Appendices D and E hereto, respectively.

JURISDICTION

The judgment of the Superior Court of Puerto Rico, San Juan Division, issued on June 8, 1993. The Supreme Court of Puerto Rico denied a petition for review of the judgment on September 10, 1993. The Supreme Court of Puerto Rico denied a timely motion for reconsideration on January 28, 1994. Its decision denying a timely second motion for reconsideration (made as of right under Puerto Rican law) was entered March 1, 1994. This petition is filed within ninety (90) days of that date. The jurisdiction of the court to review the judgment on petition for certiorari rests upon 28 U.S.C. § 1258.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant constitutional provisions are contained in Article I, Section 10, Clause 1 of the U.S. Constitution, which provides in pertinent part:

> No State shall . . . pass any . . . ex post facto Law, or Law impairing the Obligation of Contracts.

The relevant provisions of the Puerto Rico Minimum Wage laws (P.R. Laws Ann. tit. 29, §§ 245 *et seq.*), Mandatory Decree No. 38, and Law No. 96 of 1956 as amended are reprinted as Appendix F hereto.

STATEMENT OF THE CASE

The Port Authority is a public corporation established "to develop and improve, own, operate, and manage any and all types of air and marine transportation facilities and services, as well as to establish and manage mass marine transportation systems in, to and from the Commonwealth of Puerto Rico."[1] In order to effectuate this purpose, the Port Authority has the power, among other things: to adopt bylaws regarding the manner in which its general business shall be conducted; to set and collect fees for use of its facilities and services; to sue and be sued; "to make contracts and to execute all instruments necessary or convenient in the exercise of its powers"; to acquire and sell property; and to issue bonds. All Port Authority funds are maintained in separate accounts in the Authority's name. The Commonwealth of Puerto Rico is not liable on any debt instrument issued, or other obligation incurred, by the Port Authority.[2]

The Respondents are two of the unions that represent Port Authority employees. The Brotherhood of Office and Commercial Workers ("HEO") represents approximately 840 Port Authority employees, and the Cataño Transportation Workers Union ("UETC"), represents approximately 130 employees of the Port Authority.[3] The Port Authority is party to collective bargaining agreements with each of the Unions.[4]

Each of these Labor Contracts provided for the accrual of paid vacation for employees in excess of the number of vacation

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1 *See* P.R. Laws Ann. tit. 23, § 336 (Supp. 1990).

2 *Id.* §§ 336(c), (e), (f), (h), (m) & (n); 338; 342 & 346.

3 HEO and UETC are collectively referred to as the "Unions".

4 The collective bargaining agreements are referred to as the "Labor Contracts."

days required by law. Under the Port Authority's agreement with HEO, employees accrued 30 days of vacation per year (53a); and under its agreement with UETC, employees accrued 27 days of vacation per year (55a).[5] This was in contrast to the 15 days of paid vacation then required by Mandatory Decree No. 38 (the "Decree").[6]

Under the Labor Contracts in effect prior to July 6, 1989, employees were entitled each year to elect not to use their accrued vacation in excess of the first 20 days (which encompassed the 15 days required by the Decree) (the "excess vacation") and to preserve the excess vacation — without limitation — for use at a later time or for liquidation in cash upon their separation from employment with the Port Authority, whether by retirement or otherwise. (53a; 14a) Thus, for example, if he or she chose to do so, each HEO-represented employee could in effect "bank" 10 days of paid vacation every year — which could be used later or could serve as a kind of retirement or separation bonus when the employee left the Port Authority.[7]

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[5] The pages of the Appendices to this petition are referred to as "__a".

[6] Mandatory Decree No. 38 is a regulation of the Minimum Wage Board of Puerto Rico; it establishes minimum standards for wages, overtime pay, paid sick leave and paid vacation in the transportation industry. The Minimum Wage Board is authorized by statute to issue such Decrees for various industries and is required to reconsider the terms of the Decrees biennially. (32a-33a)

[7] While the UETC contract did not contain explicit provisions for the enjoyment of vacation, and the liquidation of accrued vacation upon separation from employment, it was uncontroverted below that the same accrual practices were applied to employees of both Unions and, indeed, that the accrued vacation days at issue in this case resulted from this long-standing practice between the parties. *See* Cataño Labor Contract, Article XVII, Section 3 (55a) ("Regular workers are

(continued...)

Concomitantly, the Port Authority was obligated under the Labor Contracts to allow employees, at their option, to bank excess vacation without limitation. However, the Port Authority had no obligation to pay an employee for the banked vacation unless and until the employee used the vacation or his or her employment ended. Specifically, the UETC Contract expressly stated that employees were "entitled to paid vacation leave which shall accrue on an *unlimited basis*." (55a; emphasis added) The HEO Contract expressly provided that "[e]very employee shall be entitled to receive the equivalent in cash for annual leave accrued *as of the date of resignation or separation from service for other reasons*." (14a; emphasis added) Thus, under the Labor Contracts, the Port Authority had the right to defer the cash liquidation of excess vacation until the date on which the employee's employment with the Port Authority was terminated — at which time the Port Authority was required to pay one day's pay for each day of banked vacation.

Effective July 6, 1989, the Decree was amended, *inter alia*, to increase the number of required vacation days from 15 to 17 per year. In addition, the following penalty provision was added:

> The Employer who does not grant any employee thereof the annual leave to which he/she is entitled after he/she has accrued it for two (2) years, must grant him/her the total accrued thus far, by *paying him/her two (2) times the corresponding salary for the period in excess of said two years*.

(51a; emphasis added)

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[7](...continued)
entitled to enjoy their vacation leave in accordance with a program which is to be established by the Authority . . . ."); *see also* Stipulation of Facts (50a) ("The Port Authority has always paid excess accrued vacation leave in accordance with the Collective Bargaining Agreement.").

The Unions filed grievances challenging the Port Authority's practices regarding payment for accrued vacation, claiming that the employees were entitled to have the double penalty of the Decree applied to excess accrued vacation — including excess vacation days accrued and banked prior to July 6, 1989, the effective date of the penalty provision. (50a) The parties submitted the dispute to arbitration through the Conciliation and Arbitration Bureau of the Commonwealth of Puerto Rico Department of Labor and Human Resources.

On December 24, 1992, an arbitration award was issued — applying the penalty provision of the Decree to vacation accrued and banked under the Labor Contracts prior to July 6, 1989 and ordering the Port Authority to pay to all employees represented by the Unions three days' pay for each day of banked vacation in excess of the number of vacation days that could be accrued in two years under the applicable agreement. (6a)[8] In reaching his decision, the Arbitrator recognized that the public policy fostered by the penalty provision of the Decree "is to encourage that an employee not work over two years without taking a break for a well-deserved rest." (16a) Nonetheless, he applied the penalty even to those vacation days in excess of the statutory minimum that were accrued and banked at the election of the employees in accordance with the agreement of the parties.[9]

On January 25, 1993, the Port Authority filed a timely complaint in the Superior Court of Puerto Rico challenging, *inter*

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[8] Two days' pay for each accrued and banked vacation day represents the penalty imposed by the Decree itself. An additional day's pay for each accrued and banked vacation day was imposed by application of Law No. 96 of 1956 as amended. *See* 22a & n.19 and n.14, below.

[9] The record is devoid of evidence that any employee of the Port Authority was ever prevented from taking, or allowed to bank, the minimum vacation days required by the Decree.

alia, that part of the arbitration award that imposed the double pay penalty of the Decree with respect to vacation days accrued prior to July 6, 1989, the effective date of the penalty. By judgment entered on June 8, 1993, the Superior Court rejected the Port Authority's challenge — explaining its reasoning in a mere four paragraphs.

The Superior Court summarily rejected the Port Authority's argument that the penalty should not be applied to unused vacation days accrued and banked prior to July 6, 1989. With minimal discussion, the court concluded that the arbitration award was "consonant with and in support of public policy that no employee should be kept from taking his annual leave for over two years." (4a) It did so despite the absence of any evidence — let alone a finding — that any Port Authority employee had been "kept from taking his annual leave" for any period of time.

On July 12, 1993, the Port Authority filed with the Supreme Court of Puerto Rico a timely petition for discretionary review of the judgment of the Superior Court. On September 10, 1993, the Supreme Court of Puerto Rico denied the petition for review. In its explanation of the reasons for the denial of review,[10] the Supreme Court of Puerto Rico acknowledged "the retroactive application of the penalty imposed in this case," but concluded that it was necessary to foster the "public policy . . . that no employee works more than two years without enjoying his vacations." (25a)

On September 27, 1993, the Port Authority filed with the Supreme Court of Puerto Rico a timely Motion for Reconsideration of its denial of review. Its first argument on the Motion for Reconsideration was that the penalty provision of the Decree, as construed below, violated Article I, Section 10, of the United States

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[10] The Supreme Court of Puerto Rico is required by statute to state the reasons for a denial of discretionary review. *See* Law No. 11 of June 2, 1993.

Constitution and Article II, Section 7, of the Constitution of the Commonwealth of Puerto Rico.[11] (35a) By decision entered on January 28, 1994, the Supreme Court denied the Motion for Reconsideration.

On February 4, 1994, the Port Authority filed with the Supreme Court of Puerto Rico a timely Second Motion for Reconsideration of the court's denial of review.[12] Again, the Port Authority urged that the penalty provision of the Decree, to the extent that it was retroactively applied in this case, violated Article I, Section 10, of the United States Constitution. (40a) By decision entered on March 1, 1994, the Supreme Court of Puerto Rico denied the Second Motion for Reconsideration.

REASONS FOR GRANTING THE WRIT

The new penalty provision of Mandatory Decree No. 38 requires the Port Authority to pay to all employees represented by the Unions double pay for every day of vacation accrued prior to July 6, 1989 in excess of the number of days that would be accrued under the Labor Contracts in two years[13] and to do so immediately rather than upon the termination of their employment. This is so

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[11] Under Puerto Rican law, a question of law (including a constitutional question) may be raised before the Supreme Court of Puerto Rico even if it was not raised below. *See, e.g., Sanchez v. Eastern Air Lines, Inc.*, 114 P.R.R. 691, 694-95 (1983); *Lopez v. Hospital Presbiteriano, Inc.*, 107 P.R.R. 197, 227 (1978); *Santiago Cruz v. Hernández Andino*, 92 P.R.R. 709, 711-12 (1965); *Dávila v. Valdejully*, 84 P.R.R. 101, 104 (1961); *Piovanetti v. Vivaldi*, 80 P.R.R. 108, 121-22 (1957).

[12] Rule 45(c) of the Rules of the Supreme Court of Puerto Rico allows a party to file a second motion for reconsideration as of right prior to the issuance of the mandate. P.R. Laws Ann. tit. 4, Appendix IA.

[13] This would be 60 days in the case of HEO and 54 days in the case of the UETC.

despite the fact that the vacation had accrued and been banked by employees *before* the penalty provision was added to the Decree and at a time when the Port Authority was entitled — indeed obligated by the Labor Contracts — to permit the banking of excess vacation without limitation. The penalty imposed by the Decree, moreover, is doubled by operation of Law No. 96 of 1956 as amended.[14]

The effect of the retroactive penalty provision of the Decree, therefore, is to require the Port Authority to pay its employees *three days' pay* for each day of vacation over 60 days (or, in the case of the UETC, 54 days) that the employee elected to bank before the effective date of the penalty. It is this application of an ex post facto law to punish the Port Authority for conduct that predated the enactment of the law, and to impair dramatically its rights under the Labor Contracts, that the Port Authority asks this Court to grant certiorari to correct.

The Judgment Below Is In Conflict With The Decisions Of This Court Construing And Applying The Contract Clause And The Ex Post Facto Clause Of Article I, Section 10.

As this Court recently explained, the Constitution and the decisional law interpreting it, evidence a strong presumption against retroactive legislation and the Contract and Ex Post Facto Clauses are among the constitutional provisions that express this "antiretroactivity principle." *Landgraf v. USI Film Prods.*, No. 92-757, 1994 U.S. LEXIS 3292, at *39 (Apr. 26, 1994). This presumption "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* at *37 & n.17. It expresses the belief "that individuals should have an

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[14] P.R. Laws Ann. tit. 29, § 246b(a) (an employee who receives less vacation leave than he or she is entitled to receive pursuant to a collective bargaining agreement is entitled to compensation for the leave "plus an amount equal to the unpaid amount as additional compensation").

opportunity to know what the law is and to conform their conduct accordingly." *Id.* at *37-38. In addition, the concept of fairness is undermined by retroactive legislation, much more so than purely prospective legislation, "because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 112 S. Ct. 1105, 1112 (1992).

The penalty provision of Mandatory Decree No. 38, as applied to the Port Authority, suffers from the precise flaws that this Court's teachings in the realm of retroactive legislation seek to prevent. *Landgraf*, 1994 U.S. LEXIS 3292, at *49 ("The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.").[15] Specifically, the penalty embodies the primary unfairness that underlies the presumption against retroactive legislation, namely "imposing new burdens on persons after the fact." *Landgraf*, 1994 U.S. LEXIS 3292, at *48.

Inexplicably, the Superior Court concluded that application of the penalty at issue here to vacation days accrued and banked prior to July 6, 1989 "does not constitute a retroactive application of the Decree." (4a) The Supreme Court of Puerto Rico correctly rejected that conclusion, observing that "the *retroactive* application of the penalty imposed in this case in the Mandatory Decree must be assessed in the light of the public policy it implemented." (25a; emphasis added) As this Court has made clear, "'every statute, which . . . creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed to be retrospective . . . .'" *Landgraf*, 1994 U.S. LEXIS 3292, at *43-44 (quoting *Society for*

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[15] This presumption is not limited to purely private parties; even the government is entitled to be free from the retroactive imposition of "new monetary obligations." *Id.* at *49 n.25 (and cases cited therein).

Propagation of the Gospel v. Wheeler, 22 F. Cas. 756 (No. 13,156) (CCDNH 1814) (Story, J.)); *see also id.* at *44-45 n.23 ("'A law is retrospective if it "changes the legal consequences of acts completed before its effective date"'"; "retroactive statute gives 'a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed'") (citations omitted)).

In determining whether a particular statute operates "retrospectively" the inquiry should focus on "whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at *45. Factors to be evaluated include the "familiar considerations of fair notice, reasonable reliance and settled expectations." *Id.* at *46-47. As discussed more fully below, the application of the penalty provision of the Decree to the Port Authority fails on all three counts.

The penalty as applied to employers like the Port Authority disturbed their "settled expectations" regarding the obligations they had to their employees as to how much — and when — they had to pay for accrued and banked vacation leave. The Port Authority's reliance on the fixed scope of this obligation as set forth in the Labor Contracts was certainly reasonable, as the law in effect at the time permitted such arrangements. Further, the Decree as modified provided no notice to the Port Authority that its prior practices pursuant to the Labor Contracts would be subject to harsh penalties, nor any grace period in which to alter them accordingly.

In any event, regardless how the penalty provision is characterized, its effects remain the same. It impaired the Labor Contracts between the Port Authority and the Unions and it imposed a harsh monetary penalty — effectively punishing the Port Authority for past conduct permitted by law and required by the Labor Contracts.

A. The Retroactive Penalty, as Applied to the Port Authority, Substantially Impaired Preexisting Contracts Between the Port Authority and the Unions and Is Neither a Reasonable Nor Necessary Means of Promoting the Articulated Public Purpose of the Decree.

The Contract Clause provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const., art. I, § 10, cl. 1. In order to determine whether a state law has violated that prohibition, this Court has invoked a three-part test. First, the state law must have "in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978). Second, if the law is found to work such an impairment, the inquiry next addresses whether the impairment "serve[s] a legitimate public purpose." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977). The final step of the inquiry asks whether the impairment "is reasonable and necessary" to serve the articulated public purpose. *Id.* at 25.

As shown below, the retroactive penalty imposed by the Decree substantially impaired the Port Authority's obligations under the Labor Contracts and was neither reasonable nor necessary to achieve the articulated public purpose of the Decree.

1. The Substantial Impairment of the Labor Contracts

As this Court has recognized, the purpose of a contract is to "enable individuals to order their . . . business affairs according to their particular needs and interests." *Allied*, 438 U.S. at 245. Having done so, a party is entitled to rely on the "rights and obligations" set forth in the contract. *Id.* This purpose is frustrated where, as here, subsequently enacted state legislation thwarts the reasonable expectations arising out of a party's contractual arrangements.[16]

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[16] The framers of the Constitution, in the Contract Clause, recognized "the necessity and policy of giving permanence and security to (continued...)

As explained above, the Labor Contracts in effect when the penalty provision was added to the Decree governed, *inter alia*, the amount of vacation to which covered employees were entitled and the manner in which they could accrue or "bank" any unused vacation. Each provided for vacation well in excess of the minimum required by law. In addition, under the Labor Contracts, employees were entitled to accrue or "bank" certain vacation in excess of that required by law and either to use the banked vacation at a later date or to be paid in cash for it upon the termination of their employment with the Port Authority.[17] At the time the parties entered into the Labor Contracts, the law permitted such an arrangement governing the terms and conditions of vacation leave in excess of the statutory minimum. *See* pages 16-17, and n.19, *infra*.

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[16](...continued)
contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy, and repeated interferences, produced the most perplexing and injurious embarrassments." *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 648 (1819).

[17] In this regard, it was uncontroverted below that the established practices between the parties under both the HEO and the UETC Labor Contracts were the same. While the UETC contract did not contain an explicit provision for the liquidation of accrued vacation upon separation from employment, this Court has long recognized that collective bargaining agreements are to be interpreted in light of the established practices between the parties. *See, e.g., Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 311 (1989) ("[I]t is well established that the parties' 'practice, usage and custom' is of significance in interpreting their [collective bargaining] agreement."); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579, 580-81 (1960) (gaps in a collective bargaining agreement are to be filled with "reference to the practices of the particular industry and the various shops covered by the agreement").

When the Decree was amended in 1989 to require the payment of two days' pay for every vacation day accrued in excess of the number of vacation days earned in two years, the obligation that the Port Authority had to its employees under the Labor Contracts was radically altered. Given the applicability of Law No. 96 (*see* n.14, *supra*), the Decree has in effect superimposed on the Port Authority's obligations under the Labor Contracts a requirement that the Port Authority pay *three times* the amount that it — and the Unions — had agreed would be paid for vacation days that employees elected to bank. Under this Court's decisions, as well as lower court authority applying them, such interference with the parties' contractual obligations clearly constitutes an impairment of constitutional dimensions. *See Allied*, 438 U.S. at 246 n.18 (substantial impairment where state law "compelled the employer to exceed bargained-for expectations"); *see also McDonald's Corp. v. Nelson*, 822 F. Supp. 597, 606 (S.D. Iowa 1993) (challenged regulation worked a substantial impairment because it "change[d] the rights to which the parties agreed and for which they gave consideration"); *Associated Builders & Contractors, Golden Gate Chapter, Inc. v. Baca*, 769 F. Supp. 1537, 1549 (N.D. Cal. 1991) (obligations under collective bargaining agreements were substantially impaired where agreed upon wages would in some cases be nearly doubled).

Particularly apposite is this Court's decision in *Allied*. There, an Illinois employer with an office in Minnesota had adopted a pension plan for all its employees in accordance with the applicable law at the time. 438 U.S. at 236. Under the terms of the plan, employees who reached the age of 65, as well as certain other employees who met specific length-of-service requirements, were entitled to receive a pension calculated as a percentage of their then current salary, multiplied by years of service. *Id.* at 236-37. Allied specifically reserved the right to determine the amount of contributions to be made to the plan, if any, "to amend the plan in

whole or in part [and] to terminate the plan and distribute the trust assets at any time and for any reason." *Id.* at 237.

Ten years after Allied adopted its plan, the Minnesota legislature enacted the Private Pension Benefits Protection Act in April 1974 (the "Minnesota Act"). *Id.* at 238. Under the Minnesota Act, any employer that terminated a pension plan or closed an office in Minnesota was required to pay a "pension funding charge," that was "assessed if the pension funds were not sufficient to cover full pensions for all employees who had worked at least 10 years." *Id.* Moreover, years of service prior to 1974 were to be counted toward the ten year minimum. *Id.* at 238-39.

When Allied began closing its Minnesota office shortly after the Minnesota Act became effective, it discharged eleven of the thirty employees in that office. *Id.* at 239. Nine of those eleven employees had worked for Allied for more than ten years, but were not vested under the terms of Allied's pension plans. *Id.* Nonetheless, Allied was assessed a $185,000 pension funding charge for those employees under the recently enacted statute. *Id.*

Allied challenged the constitutionality of the Minnesota Act on the ground that it "impaired its contractual obligations to its employees under its pension agreement." *Id.* at 240. This Court reversed the decision of a three-judge court, which had upheld the constitutionality of the act, finding that the Minnesota Act, as applied to Allied, violated the Contract Clause of the Constitution. *Id.* at 251. In so doing, the Court began by noting that the Minnesota Act unquestionably impacted "upon the company's contractual relationships with its employees. . . . [and] substantially altered those relationships by superimposing pension obligations upon the company *conspicuously beyond those that it had voluntarily agreed to undertake*." *Id.* at 240 (emphasis added).

In concluding that this imposition constituted a substantial impairment of Allied's contract with its employees the Court found that, under the terms of the pension plan as Allied had adopted it,

Allied "had no reason to anticipate that its employees' pension rights could become vested except in accordance with the terms of the plan." *Id.* at 245-46. The Court also found that Allied reasonably had relied on this "legitimate contractual expectation" when it determined its annual plan contributions. *Id.* at 246. According to the Court,

> The result was that, although the company's past contributions were adequate when made, they were not adequate when computed under the 10-year statutory vesting requirement. The Act thus forced a current recalculation of the past 10 years' contributions based on the new, unanticipated 10-year vesting requirement.

Id.

Like the statute challenged in *Allied*, the penalty provision of the Decree, as applied here, "nullifies express terms of the [Port Authority's] contractual obligations and imposes a completely unexpected liability in potentially disabling amounts." *Id.* at 247. Specifically, it effectively nullifies (i) those portions of the Labor Contracts that permitted employees to bank accrued vacation days in excess of those required by law and (ii) the payout provisions of the Labor Contracts — which defer any liquidation of banked vacation days until the date of separation from employment and require the payment of one day's pay (not two or three) for each day of banked vacation.

Equally important, in light of the parties' long-standing contractual arrangements and the law in effect before the 1989 revision of the Decree, the retroactive penalty was unexpected. Prior to July 6, 1989, it was clear that at least with respect to

vacation in excess of that required by law,[18] employers and unions were free to determine through collective bargaining how the excess vacation would be accrued, enjoyed and liquidated. As the Solicitor of the Commonwealth of Puerto Rico Department of Labor and Human Resources stated in a 1984 opinion,

> The parties have the power to determine the form and manner of using [vacation] days in excess of those established by mandatory decrees.

Consultation No. 12400 of the Solicitor of Labor, dated July 13, 1984 (48a).[19] Accordingly, like Allied, the Port Authority had "no reason to anticipate" the radical alteration in the terms of the Labor Contracts that the Decree imposed in July 1989.[20]

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[18] The record is devoid of evidence that any employee of the Port Authority was ever prevented from taking, or allowed to bank, the minimum vacation days required by the Decree.

[19] In an opinion released after the 1989 revision to the Decree, the Secretary of Labor of the Commonwealth of Puerto Rico reaffirmed this rule and its applicability to the decrees:

> There is nothing in the law nor in the decrees which prevents an employer from granting vacation . . . leave on top of that which is provided by the applicable decree. In these cases, the employer is the one who shall establish the criteria for the accrual, enjoyment and payment, without, clearly, having to comply with the criteria of the decree therefor. In fact, it could establish different, lesser or greater criteria for their accrual, enjoyment and payment than those in the decree.

Opinion 91-4 of the Secretary of Labor, dated November 1, 1991 (45a).

[20] Furthermore, it is well established under Puerto Rican law that no penalty may be imposed in the absence of an express statutory provision establishing the penalty. A penalty may not be presumed

(continued...)

Thus, the retroactive imposition of a penalty with respect to vacation accrued and banked prior to July 6, 1989 — when the Port Authority was permitted by law, and obligated by the Labor Contracts, to allow such accrual — was a "completely unexpected liability" within the meaning of this Court's decision in *Allied*. *See also Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dep't of Pub. Welfare*, 742 F.2d 442, 451 (8th Cir. 1984) (holding unconstitutional a state requirement that nursing home refund monies paid under rate schedule that was not unlawful when monies were paid), *cert. denied*, 469 U.S. 1215 (1985). And, given the applicability of Law No. 96 — which increases an already double penalty — the Authority now faces the prospect of paying *three times* the amount it agreed to pay its covered employees under the Labor Contracts for accrued vacation.

This new obligation — which will amount to literally millions of dollars in the aggregate — is truly a liability of "potentially disabling amounts." *Allied*, 438 U.S. at 247. Such a "[s]evere impairment," this Court has held, "will push the [constitutional] inquiry to a careful examination of the nature and purpose of the state legislation." *Id.* at 245.

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[20](...continued)

based merely on the presence of a statutory or regulatory prohibition; it must appear in the statute itself. *Puerto Rico Labor Relations Board v. Ventanas Yagüez, Inc.*, 103 P.R.R. 1308 (1975) ("[P]enalties cannot be presumed and . . . their imposition is justified only when the law expressly provides it."); *Torres v. Hull Dobbs of Puerto Rico, Inc.*, 103 P.R.R. 662 (1975) (same); *Pamblanco v. Union Carbide Caribe, Inc.*, 90 P.R.R. 693 (1964). Therefore, even if the provisions of the Decree had been construed prior to July 6, 1989 to apply to vacation in excess of that required by law, there was no penalty for noncompliance and none could be presumed.

2. The Lack of a Reasonable and Necessary Relationship Between the Retroactive Penalty and Its Articulated Public Purpose

The public purpose behind the 1989 revision of the Decree, as articulated below, was to remedy the problem of employers who did not permit their employees to take vacation leave. *See* Appendix C at 25a (public policy fostered by the Decree is "that no employee works more than two years without enjoying his vacations"); Appendix A at 4a (penalty is "in support of public policy that no employee should be kept from taking his annual leave for over two years"); Appendix B at 20a (public policy set forth in the Decree "is that of encouraging the employee to take, as a matter of fact, his annual leave, and that in no case may he work for over two years without taking it").

Nonetheless, as the Decree was construed below, there were at least two categories of employers affected by the penalty provision: (i) those who in fact did not allow their employees to take vacation for over two years and (ii) those who, in the context of collective bargaining, had agreed to provide more vacation than mandated by the Decree and to permit their employees to elect to bank (for later use or liquidation in cash) vacation days in excess of the minimum required by the Decree. The Port Authority falls in the latter category.

As applied to the Port Authority (and other employers in the latter category), the penalty provision clearly does not serve the purpose for which it was enacted. This is so because the record is devoid of evidence that any employee of the Port Authority has been prevented from taking vacation for over two years or has been permitted to bank (rather than use) the minimum number of vacation days mandated by the Decree. Thus, no matter how valid the animating purpose of the penalty provision in the abstract, that purpose cannot be relied upon to justify impairment of the Port Authority's obligations under the Labor Contracts.

To the contrary, as applied here, the penalty provision of the Decree has the effect (if not the aim) of punishing employers like the Port Authority that voluntarily agreed to vacation arrangements more generous than those required by law. In analogous circumstances, this Court struck down the Minnesota Act in *Allied*, emphasizing that the Act imposed on Allied "obligations . . . conspicuously beyond those that it had voluntarily agreed to undertake." 438 U.S. at 240. Indeed, the Court observed,

> [The Minnesota Act] was leveled, not at every Minnesota employer, not even at every Minnesota employer who left the State, but only at those who had in the past been sufficiently enlightened as voluntarily to agree to establish pension plans for their employees.

Id. at 250.

Here, moreover, the penalty provision of the Decree was not even aimed at employers like the Port Authority.[21] Rather, the Port Authority (and other employers who have agreed to similar vacation arrangements) are the unfortunate victims of an overbroad penalty provision that penalized them as well as employers that had been thwarting the public policy that the Decree sought to further. Thus, no legitimate public purpose is served by imposing retroactive penalties on the Port Authority for agreeing to provide its employees with vacation benefits superior to those required by law.

In fact, it is precisely the retroactive application of the penalty to employers like the Port Authority that robs the Decree of

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[21] The retroactive aspect of the Decree is arguably unconstitutional even as applied to employers that did prevent their employees from taking vacation for over two years. Because the Port Authority did not prevent its employees from taking vacation, however, the Court need not reach this issue to reverse the judgment below.

its otherwise legitimate public purpose. Indeed, that retroactive application of the penalty eliminates any rationale for the deference that might otherwise be due the legislative judgment reflected in the Decree. *Compare Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 418 (1983) (finding that means chosen by state legislature to implement public purpose were not deficient, "particularly in light of the deference to which the . . . Legislature's judgment is entitled") *with Allied*, 438 U.S. at 247 ("The presumption favoring 'legislative judgment as to the necessity and reasonableness of a particular measure' simply cannot stand in this case."). Thus, this Court can and should, as it did in *Allied*, undertake its own analysis of whether the retroactive application of the penalty "was necessary to meet an important general social problem." 438 U.S. at 247.

A state law that is valid prospectively may nonetheless be unconstitutional to the extent that it has retroactive application.[22] Accordingly, the retroactive aspects of a state law must be examined separately from the prospective aspects, or from the

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[22] *See, e.g., Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1249 (3d Cir.) (retroactive elimination of the "borrowed employee" doctrine from workers compensation statute, subjecting company to liability in pending cases where there previously was none, unconstitutionally impaired implied contract of employment between company and borrowed employees), *cert. denied*, 484 U.S. 963 (1987); *Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dep't of Pub. Welfare*, 742 F.2d 442 (8th Cir. 1984) (state statute violated Contract Clause to the extent that it required nursing homes to refund to residents amounts paid before enactment of new statute that were in excess of rates permitted by the new statute), *cert. denied*, 469 U.S. 1215 (1985); *Garris v. Hanover Ins. Co.*, 630 F.2d 1001 (4th Cir. 1980) (application of statute prohibiting termination of insurance agency agreements except for enumerated reasons was unconstitutional as applied to agreements entered into before enactment of statute).

statutory scheme as a whole, in order to determine if they pass constitutional muster. As the *Nieves* court stated:

> In a due process context . . . "The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." . . . The same point is apt when considering the rationality of retroactive application of a statute for purposes of the Contract Clause.

819 F.2d at 1249 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976)); *see also Landgraf v. USI Film Prods.*, No. 92-757, 1994 U.S. LEXIS 3292, at *39 (quoting *Usery*, for the same proposition); *Garris*, 630 F.2d at 1008 ("a public purpose that might clearly undergird a general exercise of police power will not necessarily protect all its parts from Contract Clause limitations on that power") (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977)).

Here, there has been no showing — nor could there be — that the retroactive application of the penalty provision of the Decree to vacation accrued and banked before July 6, 1989 was a reasonable means of ensuring "that no employee should be kept from taking his annual leave for over two years." (4a) To the contrary, imposing a penalty of three days' pay for every day of vacation in excess of 60 banked prior to July 6, 1989 — with no transitional or grace period — effectively precluded the Port Authority and other employers from requiring their employees to use the excess vacation in order to avoid the penalty. *See Allied*, 438 U.S. at 247 (criticizing the challenged statute for forcing the company "to make all the retroactive changes in its contractual obligations at one time"). Using vacation, rather than receiving money in its stead, is supposed to be the purpose that the Decree should serve. As applied to the Port Authority, however, the retroactive penalty would punish it for complying with the terms of

its Labor Contracts and would result in windfall payments for employees. It would not foster the stated purpose of the Decree — *i.e.*, ensuring that no employee works for more than two years without taking vacation.

In these circumstances, the enormous penalties imposed on the Port Authority by retroactive application of the Decree constitute an unconstitutional impairment of its obligations under the Labor Contracts. Accordingly, for that reason alone, the petition for writ of certiorari should be granted and the judgment below should be reversed.

B. The Retroactive Penalty, as Applied to the Port Authority, Violates the Constitutional Prohibition Against Ex Post Facto Laws.

Because of the particular nature — and magnitude — of the penalties imposed, the retroactive penalty provision of the Decree also violates the Ex Post Facto Clause of the Constitution. That clause provides: "No State shall . . . pass any . . . ex post facto Law." U.S. Const., art. I, § 10, cl. 1. "The mark of an ex post facto law," this Court has held, "is the imposition of what can fairly be designated punishment for past acts." *De Veau v. Braisted*, 363 U.S. 144, 160 (1960). A particular statute imposes punishment when it "serves the twin aims of retribution and deterrence." *United States v. Halper*, 490 U.S. 435, 448 (1989); *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17-18 (1976) ("[W]e would . . . hesitate to approve the retrospective imposition of liability on any theory of deterrence or blameworthiness.") (citations omitted).

In its recent decision rejecting the retroactive application of the damages provisions of the Civil Rights Act of 1991, this Court discussed whether it would be appropriate to apply retroactively a newly-created punitive damages provision. *Landgraf v. USI Film Prods.*, No. 92-757, 1994 U.S. LEXIS 3292, at *69 (Apr. 26, 1994). In its analysis, the Court recognized that "[t]he very labels

given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions." *Id.* Accordingly, the Court determined that imposing such damages retroactively "would raise a serious constitutional [ex post facto clause] question." *Id.* (citing *Usery*, 428 U.S. at 17, *De Veau v. Braisted*, 363 U.S. at 160 and *Louis Vuitton S. A. v. Spencer Handbags Corp.*, 765 F.2d 966, 972 (2d Cir. 1985) ("retroactive application of punitive treble damages provisions of Trademark Counterfeiting Act of 1984 'would present a potential ex post facto problem'")).[23]

The retroactive penalty provisions at issue here suffer from the very constitutional infirmity identified by this Court in *Landgraf*.[24] Plainly, the penalty serves no purpose but to punish the Port Authority, and other similarly situated employers, for past conduct — conduct that was permitted when the employees elected to bank the excess vacation days upon which the retroactive portion of the penalty has been calculated. Thus, the "twin aims of

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[23] There was no need to reach the Ex Post Facto Clause issue in *Landgraf* because the Court concluded that the punitive damages provision of the Civil Rights Act of 1991 applies only prospectively.

[24] In fact, the penalty currently facing the Port Authority is far worse than the punitive damages that the Civil Rights Act of 1991 introduced, where the maximum exposure is capped at graduated levels based on the number of persons employed by a particular employer and cannot exceed $300,000. *Landgraf*, 1994 U.S. LEXIS 3292, at *68.

Here, in contrast, the retroactive penalties imposed on the Port Authority by the decision below are estimated to be at least 2.2 million dollars. (*See* Affidavit of Miguel E. Hernandez Jimenez, ¶2, dated May 20, 1994, attached to the Port Authority's Application for Recall of Mandate and Stay of Execution and Enforcement of Judgment Pending Filing of Petition for Writ of Certiorari.)

retribution and deterrence" (*see United States v. Halper*, 490 U.S. at 448) clearly are at play here.

First, by requiring employers to pay triple for accrued but unused vacation days, the Decree does not merely compensate the employees for the unused days, but provides them with a windfall. (*See* n.24, *supra*.) The windfall is even more obvious, and the penalty more onerous, in the instant case because the employees themselves chose to bank their excess vacation days for later use or reimbursement and now will receive a bonus for having done so. Plainly, the penalty is not merely remedial in its aim, but singles out employers like the Port Authority — penalizing them for their past practices.

Second, as expressly acknowledged below, the addition of the penalty provision in 1989 was specifically designed to deter employers from not complying with the Decree. *See* Appendix A at 3a (the penalty "*seeks to prevent*" employers from keeping employees from taking vacation for more than two years) (emphasis added); and Appendix B at 20a ("What the 8th Review does is to provide the double pay that the Decree did not have, *precisely to oblige the Employer to give his employees annual leave.*") (emphasis added). Indeed, even the Unions apparently recognized the punitive nature of the penalty. *See* Appendix B at 18a (noting with apparent approval the Union's argument that "the Decree . . . *directly penalizes* the Employer for having accrued [vacation] for over two years") (emphasis added). While the penalty thus "can be expected to give . . . added incentive," for employers to comply with the Decree, "that purpose is not served by applying the regime to preenactment conduct." *Landgraf*, 1994 U.S. LEXIS 3292, at *71 n.35.

This is especially true for employers like the Port Authority, who did comply with the Decree and in fact provided more vacation for their employees than was legally required. As to them, this retroactive penalty provision is punishment, pure and simple,

imposed as a result of past conduct. It is precisely the type of state legislation that the Ex Post Facto Clause proscribes. Accordingly, for this reason as well, the petition for writ of certiorari should be granted and the judgment below should be reversed.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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